Supreme Court, U.S.
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No. 98-1997

In The

Supreme Court of the United States

HARCROS CHEMICALS, INC.,

Conditional Cross-Petitioner,

v.

CITY OF TUSCALOOSA, *et al.*,

Cross-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF CROSS-RESPONDENT JONES CHEMICALS, INC., IN SUPPORT OF CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

JAMES C. BARTON
Counsel of Record
ROBERT S. VANCE, JR.
R. MARCUS GIVHAN

JOHNSTON BARTON PROCTOR & POWELL LLP
2900 AmSouth Harbert Plaza
Birmingham, Alabama 35203-2618
(205) 458-9400

Attorneys for Cross-Respondent, Jones Chemicals, Inc.

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PARTIES TO THE PROCEEDINGS

Auburn Water Works Board, Plaintiff
Baker Hill Water Authority, Plaintiff
The Board of Water and Sewer Commissioners of the City of Mobile, Plaintiff
The Board of Water & Sewer Commissioners of the City of Saraland, Plaintiff
Calhoun County Water and Fire Protection Authority, Plaintiff
Central Elmore Water Authority, Plaintiff
The City of Alexander City, Plaintiff
The City of Dothan, a municipal corporation, Plaintiff
City of Fairhope, Plaintiff
The City of Huntsville Water Works Utility Board, Plaintiff
City of Phenix City, Plaintiff
City of Sheffield, Plaintiff
City of Tuscaloosa, Plaintiff
City of Vernon Water and Sewer Board, Plaintiff
Dallas County Water and Sewer Authority, Plaintiff
Geneva Water Works and Sewer Board, Plaintiff
Harcros Chemicals, Inc., Defendant
Industrial Chemicals, Inc., Defendant
Jasper Water Works and Sewer Board, Inc., Plaintiff
Jefferson County, Alabama, Plaintiff
Jones Chemicals, Inc., Defendant
Municipal Utilities Board of Albertville, Plaintiff
North East Morgan County Water and Fire Protection Authority, Plaintiff
Opelika Water Works Board, Plaintiff
P.B. & S. Chemical Co., Inc., Defendant

PARTIES TO THE PROCEEDINGS – Continued

Perdido Bay Water, Sewer and Fire Protection District, Plaintiff
Town of Hayneville, Plaintiff
Tri-Community Water System, Plaintiff
Utilities Board of the Town of Citronelle d/b/a South Alabama Utilities, Plaintiff
The Utilities Board of the City of Gulf Shores, Plaintiff
The Utilities Board of the City of Muscle Shoals, Plaintiff
Van Waters & Rogers, Inc., Defendant
The Water Works Board of the City of Arab, Plaintiff
The Water Works and Sewer Board of the City of Birmingham, Plaintiff
Water Works & Sewer Board of the City of Centre, Plaintiff
The Water Works and Sewer Board of the City of Gadsden, Plaintiff
The Water Works and Sewer Board of the City of Greenville, Plaintiff
The Water Works Board of the City of Leeds, Plaintiff
The Water Works and Sanitary Sewer Board for the City of Montgomery, Plaintiff
The Water Works and Sewer Board of the City of Prichard, Plaintiff
The Water Works, Sewer and Gas Board of the City of Scottsboro, Plaintiff
The Water Works and Sewer Board of the City of Selma, Plaintiff
The Water and Sewer Board of the City of Talladega, Plaintiff
Westover Water and Fire Protection Authority, Plaintiff

STATEMENT PURSUANT TO RULE 29.6

Jones Chemicals, Inc. is a privately-owned corporation. No publicly-held company owns 10% or more of the stock of Jones Chemicals, Inc., and Jones Chemicals, Inc., has no subsidiaries.

TABLE OF CONTENTS

Page

Table of Authorities v

Statement of the Case 1

Reasons for Granting the Writ 3

Conclusion 6

TABLE OF AUTHORITIES

Page

CASES:

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786 (1993) 2

Theatre Enterprises v. Paramount Film Distribution Corp., 346 U.S. 537 (1954) 3, 5

OTHER AUTHORITIES:

ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS (3rd ed. 1992) 3

VI Areeda, ANTITRUST LAW (1986) 3

STATEMENT OF THE CASE

Respondent Jones Chemicals, Inc., concurs with and adopts the Statement of the Case in the Conditional Cross-Petition for Writ of *Certiorari* filed by Harcros Chemicals, Inc., and adds the following:

The repackaged chlorine industry consists of firms that purchase liquid chlorine from manufacturers and repackage the chlorine into pressurized cylinders for resale to the ultimate users. Defendants in the district court (hereinafter "repackagers") include a handful of chlorine repackagers that were among those servicing customers in Alabama during the 1980s. Plaintiffs in the trial court ("municipalities") consist of Alabama municipal entities and water works authorities that were among the repackagers' customers because of their need for chlorine in water and sewer treatment.

One of the repackagers is Jones Chemicals, a New York company that sells a variety of chemicals. Jones Chemicals serviced customers in the southern part of Alabama from its Mobile, Alabama branch office. It was not involved in the northern Alabama market. Between 1984 and 1990, Jones Chemicals' market share in Alabama dropped by 50%. No evidence before the district court pertained to Jones Chemicals' profit margins or other measure of its financial performance during that time, moreover.

In Alabama during the 1980s, most municipalities purchased chlorine through negotiated contracts. The repackagers also sold chlorine to numerous non-municipal customers, primarily large businesses requiring chlorine for their operations. There were relatively few

situations in which chlorine contracts were awarded by municipalities pursuant to a sealed bid process. The municipalities' expert evidence ignored the more prevalent negotiated contracts, focusing instead on perceived patterns resulting from the few bid results.

The repackagers did not dispute that a number of tie-bid situations occurred throughout the alleged conspiracy period of 1983 to 1989. In tie-bid situations, municipalities frequently – but not universally – awarded contracts to the incumbents that had provided service the year before. No evidence was presented on how any of the municipalities arrived at their decisions in those circumstances, and there was no suggestion that the repackagers had any influence in the municipalities' decision-making process. Some of the larger municipalities dealing with tie-bid situations opted *not* to go with the incumbent.

In the district court, none of the plaintiff municipalities could themselves testify as to the alleged conspiracy among the repackagers. In opposing the repackagers' summary judgment motions, the municipalities instead relied almost exclusively on their expert evidence. Their retained economist reached his conclusions based on his review of bid patterns and the scant financial data of some of the other repackagers. The district court ultimately determined that the municipalities' expert evidence was due to be stricken for failing to meet the standard of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993), and the repackagers' summary judgment motions were granted.

REASONS FOR GRANTING THE WRIT

Jones Chemicals, Inc., supports the Conditional Cross-Petition filed by Harcros Chemicals, Inc., and asks that Harcros' Petition be granted. In addition to the reasons provided by Harcros in its Petition, Jones Chemicals adds the following:

In *Theatre Enterprises v. Paramount Film Distribution Corp.*, 346 U.S. 537 (1954), parallel behavior alone was held to be insufficient to prove a conspiracy. This holding was accompanied by the observation that "[c]ircumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude of conspiracy; but conscious parallelism has not read conspiracy out of the Sherman Act entirely." *Id.* at 541. Since *Theatre Enterprises*, "[t]he courts approach unanimity in saying that mere interdependent parallelism does not establish the contract, combination or conspiracy required by Sherman Act, § 1." VI Areeda, *Antitrust Law* at ¶ 1433a (1986); *accord* ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS, at 6 n.43 (3rd ed. 1992) (cases cited in support of this law). A tie-bid situation, moreover, is but one example of parallel pricing. *See, e.g.*, Areeda at ¶ 1420a, at p. 119.

The municipalities nevertheless argued to the Eleventh Circuit that the submission of identical bids by the repackagers was sufficient evidence in itself to preclude summary judgment. In reversing judgment for the

repackagers, the Eleventh Circuit contravened the authorities cited above by finding that the necessary "plus factor" exists in the form of the "high and rising incumbency rates demonstrated by McClave's data. . . . " The Eleventh Circuit concluded that "this combination of high profits and high incumbency would not be likely to occur if the defendants either were vigorously competing with each other or were engaging in competitive price leadership."

By characterizing high incumbency rates as the "plus factor" necessary to show a *prima facie* case, the Eleventh Circuit held that the direct consequences of consciously parallel behavior may establish liability. As the experts for both sides agreed, a high incumbency rate depends on a high rate of tie-bids. In addressing this point in his deposition, the municipalities' statistician, James McClave, acknowledged that the rate of tie-bids, the incumbency rate, and the repackagers' market shares were three faces of the same phenomenon:

> Q. So the three statistics that you've used in your analysis, tie-bids, incumbents winning more often and stable market shares are all three correlated. Isn't that correct?
>
> A. Yes.
>
> Q. And if there was some explanation for the tie-bids other than collusive behavior, that explanation would also reach to some extent to the incumbents winning more often and to the stable market shares, wouldn't it?
>
> A. To some extent, yes.

> Q. Tie-bids, incumbents winning and market shares are not independent events, correct?
>
> A. Correct.

In their briefs to the Eleventh Circuit, the municipalities conceded that high incumbency rates resulted from parallel pricing. They also contended that parallel pricing suffices to show an antitrust conspiracy, notwithstanding *Theatre Enterprises* and its progeny.

Failing to recognize that high incumbency rates result from parallel pricing in the form of tie-bid events, the Eleventh Circuit opined – especially at footnote 38 of its opinion – that high incumbency rates must result from illegal communication among the defendants. No economic authority or legal precedent was cited in support of this proposition.

Identifying results from parallel pricing as the requisite "plus factor" is an approach that cannot be reconciled with governing law. The precedent of this Court and of all other circuits invalidates the approach taken by the Eleventh Circuit.

CONCLUSION

Based on the conflict among the circuits, Jones Chemicals, Inc., supports the pending cross-petition by Harcros Chemicals, Inc., and asks that this Court grant the writ of *certiorari*.

Respectfully submitted,

JAMES C. BARTON
Counsel of Record
ROBERT S. VANCE, JR.
R. MARCUS GIVHAN

JOHNSTON BARTON PROCTOR
& POWELL LLP
2900 AmSouth Harbert Plaza
Birmingham, Alabama 35203-2618
(205) 458-9400

Attorneys for Respondent,
Jones Chemicals, Inc.